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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM—1955.

No. 105. 1

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

MICHAEL E. HANRAHAN,
Counsel for Respondent,
67 Wall Street,
New York 5, N. Y.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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BRIEF FOR THE RESPONDENT.

Counter-statement of the Case.

Petitioner, William Thompson, was employed aboard respondent's SS. *Rosina Marron* as second cook from October 20, 1949 to January 15, 1950 at a monthly wage of $248.49. Also employed during this period and for some six months prior thereto, was a crew messman, Mario Medina. These men were the only colored members of the crew aboard. Medina was effeminate (see R. 60a and 61a), although he got on well with the crew. *His record was barren of any evidence of misconduct, viciousness or violence.*

On the night of January 12, 1950 Thompson claimed he found Medina engaged in a homosexual act with certain white members of the crew. He reported this and

on the next night, following a union meeting, Medina waylaid Thompson and assaulted him with a meat cleaver.

The alleged homosexual act is not only uncorroborated but vehemently denied by Schopf, one of the alleged participants (see Schopf's deposition beginning R. 1a).

On January 15, 1950 Thompson was removed from the vessel and hospitalized at the Corpus Christi Marine Hospital. Excerpts from that record appear at R. 314a. On February 10, 1950, he was transferred to the New Orleans Marine Hospital at his own request. There the diagnosis was fracture simple of skull, right parietal lane, lacerated wound of scalp; verruca plana skin dorsum of penis (R. 315a). He left that hospital on March 18, 1950 for purposes of attending at the trial of Medina in the Federal court at Corpus Christi. On route he became ill and spent two days at the Galveston Marine Hospital (R. 316a). He then proceeded to Corpus Christi and testified at Medina's trial. He returned to the Galveston Marine Hospital, and was an in-patient until April 1, 1950 (R. 318a). Upon discharge, he proceeded to New York and was treated at the Marine Hospital at Staten Island, New York from April 9 to April 28, 1950. The final diagnosis there was encephalopathy due to trauma. His condition was marked "improved" and the prognosis marked "good". *One month's convalescence leave was recommended, and it was estimated that he would be fit for duty on May 29, 1950* (R. 319a).

While at these four marine hospitals, petitioner, Thompson, was approached by some twelve to sixteen attorneys, who offered their professional services (R. 248a). These offers petitioner refused as he expressly desired to handle his claim himself. As a matter of fact he wrote nine letters to the owner's agents, Sieling &

Jarvis Corporation, indicating this intention (R. 338a-346a). These letters are most illuminating, and excerpts should be quoted (R. 342a):

> "Some wise guys from the Hall up In New York told some lawyer of my accident. Two of them was here to see me. They tells me a lot of trash. I listen till they were finish. I told them I'm a sick man. When I was well I work for Sieling-Jarvis and up till now they are very nice to me and I'm sure when I get well they will take care of me the best they can. If you two Chissler don't get to hell out of here quick, I will call the doctor. Boy, you ought to see them scramble out. I laugh at them. My head has two compound fractures. I just no I will be up soon. I got my fingers cross. Please keep my job for me. Thank you."

(R. 346a):

> "Please send some one from the office to see me. So many come to see me I told them I'm still sick and don't want to talk to any lawyer. Its three months now since I got hurt. I won't talk to or see any one till I seen some one from Sieling-Jarvis.
>
> I got here Sunday from Corpus Christi.
>
> Please let me hear from you soon so I can no what to do. Lots of guys telling me different tales. I don't listen to them."

While at these four hospitals petitioner experienced considerable pain and knew he was severely hurt as he describes throughout his testimony. Particularly at R. 93a, he tells about overhearing the doctors at Corpus Christi whispering when they thought he was asleep. "He is going to live—but we think he is going to have plenty of trouble."

His letters also indicate an awareness of the extent of his injuries (R. 338a):

> "Dear Sir the Doctors think that the worst is over I'm still a little dizzy. I can set up in bed and walk to the bathroom and back. I'm thankful that I'm alive after what happened. I think I will be able to travel in six or 8 days time if I continue to improve like I'm doing now."

(R. 341a):

> "They refuse so I come on to this hospital. My sister and friends met me at the station and take me here. I did not go home I was feeling sick after the long ride. The doctors here told me I take a hell of a chance riding on a train with a fractured skull. Now I'm back in bed again. But I rather be here with my family than go to Galveston where they wants to transfer me."

(R. 343a):

> "Dear Sir I'm not too well. My head still doing tricks to me. One minute I'm down sick, my head pain very bad, then I feel a little better till the spell come on again. The trial come up Monday. I'm not well, but I'm taking a chance going to Corpus Christi to be at the trial. I almost die on the way over here. I will try and come to New York after the trial. Sir it may be two or three months before I will be able to go back to work. Please sir I like my job on the Rosina please keep it open that I can go back when I'm well."

(R. 344a):

> "I won't be able to work for a while the Dr. say I need lots of rest and quiet if I'm ever to get well. You don't know sir but I sure was hurt triple fractured. I never thought I would be alive to-day."

His own physician, Dr. Somberg, a staff member at the Stapleton Marine Hospital, testified that it was standard procedure at that hospital to familiarize a patient with the extent of his disability at the time of discharge (R. 1 2a).

After his final discharge from Stapleton on April 28, 1950, petitioner lived for a few days at the Seamen's Church Institute, South Street, New York City. Then, equipped with his final discharge slip from the hospital, *he voluntarily* called on a Mr. Mahoney of Sieling & Jarvis Corporation, respondent's agents (R. 203a). He told Mr. Mahoney that he still had severe pain and that he wanted to rest. He expressed the desire to go to Hot Springs, Arkansas. Mr. Mahoney asked him how much he wanted to go, and he said $300.00. This was given to him. He informed Mr. Mahoney that the doctors at the marine hospital said he should rest for a month before going back to work (R. 204a).

(R. 203a):

> "Q. Did Mahoney contact you or did you go to the office? A. No, he didn't contact me, I went to the office, it is just a few blocks.
>
> Q. You went to Mr. Mahoney's office and he—what did he say to you and what did you say to him? Do you recall—is that when you wanted to go to Hot Springs? A. You want to know what I said to him and what he said to me?
>
> Q. Yes. A. Well, he asked me if I am well and I tell him no, I don't think I am quite well because I still had pains in my head but I would like to get some money to go down to Arkansas some place in the country, maybe for two or three weeks and I might be better when I came back.
>
> Q. Did you tell him how much money you needed and did he give it to you? A. He asked me how much I needed and I said three hundred dollars about, and he gave it to me.

Q. When you came to Mr. Mahoney did you have a discharge certificate from the marine hospital? A. From the marine hospital, sure, I got to have one to leave there, you know that.

Q. You gave him that? A. I don't know whether I gave it to him or I kept it but I know I showed it to him.

Q. That is the one that told you you had to lay off for a month before going back to work, is that right? A. Yes."

He returned from Hot Springs after three weeks and then again went to Mahoney on his own.

At respondent's request, a physical examination was arranged to be conducted by Dr. Charles E. Farr. This was conducted on May 18th. Dr. Farr found that the man had a fractured skull and was suffering from considerable nervous shock (R. 158a). Dr. Farr suggested that the man not return to work for at least three months, or until about August 18, 1950 (R. 159a). He also opined that the man would have a 10 per cent permanent disability (R. 159a). Dr. Farr merely examined and did not give any medical advice to the man (R. 165a and bottom R. 107a).

"Q. At any time did he say you were a well man? A. No he never said anything like that."

Petitioner went back to Mr. Mahoney and began settlement discussions (R. 106a). Mr. Mahoney sent Thompson over to one Barron of Shipowners Claims Bureau, an organization which adjusts claims for shipowners.

Mr. Barron in his discussions with Thompson, read that portion of Dr. Farr's report predicting a 10 per cent permanent disability (R. 260a). Thompson had his hospital discharge with him when he went to Barron. In the discussion, Thompson first demanded $15,000.00 (R. 259a). He

eventually agreed to $4,000.00 which included the advance of $300.00 for the Hot Springs, Arkansas trip. He then executed the release, which appears on R. 347a of the Appendix. The release contained a clause which reads as follows:

> "4. Regardless of what anyone may have told me I realize also that my injuries and illnesses and disabilities may have been, may be, or may turn out to be worse than they seem to be now, I am now settling for that too."

Prior to executing the release, Barron explained the alternative of suing to Thompson (R. 261a). He told Thompson that if he brought a lawsuit he may get more or less. Thompson had been going to sea for 40 years (R. 123a) and had settled claims prior to this. He had previously executed releases (R. 191a *et seq.*). He had previously employed attorneys (R. 192a). The trial court assumed (R. 207a) that the man knew what he was signing when he signed the release.

Much ado has been made about so-called misrepresentations of law and fact made by Barron to Thompson in their discussions. It is therefore necessary to quote from the record (R. 259a):

> "Q. Now you say you saw him twice. Would you concern yourself with the first meeting. Can you recall approximately how long it took? A. Yes, I can recall it very well. Mr. Thompson and I were in a particular room. He came over and talked about his claim at that time. He said at that time he wasn't feeling so very well. He did discuss settlement figures with me. We didn't get together exactly on anything at that time but Mr. Thompson thought it would be best for him if he went to Hot Springs, Arkansas, I think it was, and took some baths down

there. He said somebody had told him those baths would be beneficial to his well-being.

Q. Was any figure mentioned to you by Mr. Thompson at that first meeting? A. I think first he mentioned fifteen thousand and then he came down to six thousand."

(R. 260a):

"Q. Even at the second meeting did you have any discussion with respect to Dr. Farr's report with Thompson himself? A. Yes, I did. Well, as I remember it, Dr. Farr found he had a 10 per cent permanent disability of his body and I made that known to Mr. Thompson.

Q. How did you make it known to him? Did you read the report? A. I read that portion of the report to him, I think it was the conclusion that was found by Dr. Farr as I remember the report."

(R. 260a):

"Q. What went on at the second meeting? A. Well, Mr. Thompson came back, I presume from Hot Springs, Arkansas, where he had gone to take the baths, and we resumed discussion and he agreed to accept the four thousand dollar figure, I think it was, that I offered.

Q. And the release was entered into? A. And a release was entered into.

Q. Now, in this discussion as to amount to pay on the case, was there any consideration discussed of the period of disability, the period of maintenance? A. Well, there was a very brief period of maintenance, as I remember it, which didn't amount to anything, maybe to, roughly, about two hundred dollars.

Q. You mean for outpatient treatment? A. For outpatient care, and in our talk discussing the thing back and forth we discussed the possibility, of course, that if he could not substantiate his claim he would be entitled to no more than the two hundred dollars.

Q. You mean if he couldn't establish liability. A. That's right, yes. On the other hand, it was also discussed mutually between the two of us, the possibility of him getting more than four thousand dollars if he were able to substantiate the liability in court, if he got before—well, if the facts were such and the Court so found, he might get more than four thousand dollars, he understood.

Q. In other words, there was discussed the alternative to settling the case, that is, suing? A. Oh, absolutely. He told me he had seen lawyers and so forth, himself, and there was no question at that time that he didn't—*in fact, he told me certain lawyers expected to get, oh, much more than fifteen thousand that he originally mentioned.*" (Emphasis supplied.)

(R. 262a):

"Q. *Did you at any time tell him that he had completely recovered or that he was well?* A. *No, I did not.* (Emphasis supplied.)

Q. As a matter of fact, you told him what Dr. Farr said? A. I told him what the doctor told him and that was it. I am not a doctor and all I could tell him was what the doctor told him and let him make up his own mind."

(R. 263a):

"Q. Now, when Thompson came to you did you believe that he had a good case against the shipowners? A. I didn't believe he had a good case against the shipowners, no.

Q. Did you tell him that? A. I feel I probably—well, do you want a direct answer to that?

Q. Well, I don't care, direct or not. You and I are friendly enough so we don't have to have a quarrel. A. What we had, actually, was a discussion of the pros and cons rather than a directive from me that he was not entitled to a dime. We discussed the possibility of him not getting anything and we discussed the possibility of him making a

better figure than what I was willing to pay in settlement."

(R. 266a):

"Q. How did you make up this four thousand dollars? Tell us the workings—I won't want to go into your business because I know it's highly skilled and highly specialized business but, not telling any trade secrets, sir, how did you get—arrive at your four thousand dollar figure, or how was it arrived at? A. As I told you before, when I first discussed it with Mr. Thompson he made mention of the figure of fifteen thousand dollars which was the figure which he sought in order to settle the case. After discussing it with him, he came down to six thousand dollars. My thought was four thousand dollars because of this: in the first place he had something approximating two hundred dollars in maintenance, he had lost at that time about five or six months' base wages and overtime, which would have run about to two hundred and fifty, or maybe a little better a month, so his total special damages could not have been more than two thousand dollars, at tops, if, of course, there was any liability at all.

If there was no liability, he would be entitled to about, again about two hundred dollars, and that would be it. So, assuming there was, for the purposes of settlement, only that there was apart from liability in the case, he would get special damages which would make it about two thousand dollars. I realized, of course, that the cost of defending a case in court—I know it costs you money to hire lawyers and so forth. Mr. Thompson, himself, gave a figure of six thousand dollars as a figure which he would be willing to take right then and there, and he had, as he said, spoken to attorneys about the case and so forth. So I pointed out to him that if he were to accept four thousand dollars in settlement he would probably be saving some money for himself

because most attorneys, so far as I know, take at least one-third of any figure in settlement; some take forty per cent; some take fifty, but the average runs to about a third and if he were to take about four thousand dollars he would be getting as much with four thousand as if he had retained attorneys and paid an attorney the other two thousand dollars. I thought, too, if we were to pay over four thousand dollars it would be worth our while to go to court and fight the thing. All we could lose—well, we had a two hundred dollar item that we were going to definitely be out, as far as I knew, from there on it was a question of the jury to determine the amount of the man's damages, if he is entitled to any, and at that time it didn't appear to me there was too much liability on the ship's part."

(R. 268a):

"Q. Let me ask you this: is he alone in sending seamen to lawyers when he is going to try a case? Or let me put it this way: isn't it sort of the practice among you gentlemen who are in the underwriting business, or managing these cases for shipowners, when you get a case that involves some serious injury like knee injury, semilunar cartilage, or something like that, isn't it the usual thing to send that man to a lawyer before you settle with him? A. It certainly is not."

(R. 269a):

"Q. You knew, did you not, Mr. Barron, that this man had little education? A. No, he impressed me—I don't know how much formal education he had but he impressed me with being a highly intelligent person.

Q. Did you think at that time that he knew what was liability? A. I certainly did.

Q. There were forerunners of the Keen Case, weren't there? A. To my recollection, not, no.

Q. The Keen Case was not picked out of thin air, was it? A. Again, sir, you're asking me for my

opinion. My only opinion of the Keen Case is, of course, something that has nothing to do with it.

The Court: Well, all right, if neither of you knew the Keen Case then you were both going on the basis of a mutual mistake of law.

Mr. Hanrahan: The Keen Case wasn't decided then.

The Court: Then you were both going on the basis of a mutual mistake of law if the Keen Case is good law, and I think it is.

Q. Mr. Barron, you were mistaken in your views of whether or not there was liability in the set of facts such as this. A. No, I was not.

Q. Your thought then— A. I didn't bring this Keen Case into it, I mean in this conclusion. Now, I don't think I was wrong at that time because even under the circumstances as they were given to me this was not at all on all fours with the Keen Case in any manner, shape or form.

The Court: In your judgment.

The Witness: In my judgment, yes.

Q. In what way was it different? A. It was different in this respect: in so far as we know from information at hand——

The Court: Well, whether he thought it was or not is relatively immaterial.

Q. Now, Mr. Barron, there was, was there not— at least there was not a meeting of the minds. Let me put it this way. There was some mistake in your idea that there couldn't be any liability here. That is right, isn't it?

The Court: There might have been.

A. I didn't say there was no liability, I judged the both extremes: on the one side, none, and on the other side, full liability. Mr. Thompson did, too."

Thompson went back to work on July 21, 1950, more than one month ahead of Dr. Farr's prediction, and had been steadily employed for four years to the time of the

trial. (See record of employment according to Coast Guard records from 1948 to date, which begins on R. 334a.) (A close scrutiny of this employment record indicates that the period of Thompson's employment aboard an average vessel before the accident is about the same as after the accident. There are some voyages before and after which might only amount to one-half month, two months and in some instances five months, but the average both before and after the accident are virtually the same.)

The trial judge opined that the man was only able to work as a dishwasher. On the contrary, *the record indicates that he had frequently sailed at ratings higher than his job aboard the SS. Rosina Marron.* For instance, two years after the accident aboard the Grace Line's SS. *Santa Catalina,* he sailed as chief cook (R. 111a). Three years later in 1952 he was a chief cook on the SS. *Sea Glorius* (R. 188a). Actually, the first vessel that he sailed on as dishwasher was the Moore-McCormack SS. *Uruguay,* and this was only two months prior to the trial of this action in January 1954 (R. 226a, R. 227a). On the thirteen ships that he sailed on subsquent to the accident, *he passed physical examinations prior to employment, and during employment never made any complaints of physical disability* (see oral stipulation by petitioner's attorney beginning on R. 243a).

Subsequent to executing the release Thompson was treated at various marine hospitals on six occasions, *principally for causes unrelated to the accident of January 13, 1950* (Emphasis supplied). For instance, from February 16th to April 20, 1951, he was treated for a duodenal ulcer and urethritis (R. 321a). From June 11th to July 1, 1951, at the Baltimore Marine Hospital, he was treated for kidney trouble (R. 322a). Then again, at Stapleton, Staten Island, from February 13th to March 3, 1952 for a penal sore and

a duodenal ulcer (R. 324a). Again at Baltimore Marine Hospital from March 29th to April 9, 1952 for a prostate operation (R. 326a) and from November 13th to December 15, 1952 he was treated at the New Orleans Marine Hospital for an ulcer, a schizophrenic reaction, and a disease of the liver (R. 327a). Just prior to the trial of this action, he made two visits as an outpatient to the Stapleton Marine Hospital where he had a routine examination of the skull (R. 332a) and there was *no evidence of fracture or prolonged increased intercranial pressure.*

The record is barren of any evidence of treatment for encephalopathy subsequent to executing the release.

Summary of Argument.

The Respondent sustained its burden under the Garrett Rule in proving that the release was entered into by the petitioner voluntarily with full knowledge, with available legal and medical advice, with an adequate consideration and without coercion and duress on the part of the Respondent. To upset a release executed under the circumstances involved here would have a most detrimental effect on the expeditious, amicable adjustment that is now made of the majority of seamen's claims without recourse to the courts. The circumstances surrounding the execution of this release clearly indicate that Thompson voluntarily approached the Respondent and instituted negotiations. That he had full knowledge of what he was doing. That he had the best medical advice from the United States Marine Hospitals and while he did not have a lawyer, he had several offers which he declined and accordingly chose to handle the case himself. There was adequate consideration. In any event, Thompson settled a case of questionable liability.

ARGUMENT.

Respondent sustained its burden under the Garrett rule in proving the release was entered into by petitioner voluntarily with full knowledge, with available legal and medical advice for an adequate consideration and without coercion or duress on the part of the respondent.

A release is a contract. The entire business, economic and social structure of the civilized world is regulated largely by contracts. For this reason, the law is well settled that contracts will not be set aside except for specified reasons. The reasons are fraud or deception, duress or coercion, and mistake or otherwise put, executing without full understanding.

The specific law of releases concerning merchant seamen is actually the same law as above quoted. The leading case of *Garrett* v. *Moore-McCormack*, 317 U. S. 239, merely settled the point that the *burden of proof* in such cases shifted from the person seeking to set aside the release, to the person who set it up as a bar to a seaman's claim. The substantive points were not in any way changed by that decision, but have merely been put in the negative. It is respondent's burden to show that there was no fraud or deception, no duress or coercion, and that the seaman executed the release with full understanding of his rights. It is submitted that the respondent has adequately sustained this burden.

There is a tendency, however, in trying a personal injury case, such as this, to look upon the situation as it exists at the time of trial, as distinguished from the situation as it existed at the time the release was executed. This tendency is one to be guarded against.

In the *Garrett* case, the court stated (248):

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that *it was* executed freely, without deception or coercion, and that *it was* made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman *at the time of signing the release* are relevant to an appraisal of this understanding." (Emphasis supplied.)

It will be seen from the foregoing quotation that this Court was interested in determining the validity of the release at the time of its execution, and at no other time. There is no rule of law which requires the respondent to prove that the consideration passed would be the same consideration that a jury might award to a plaintiff at the present time. It is sufficient that the seaman and the claim agent were dealing at arm's length and that a bargain was effected with full understanding on both sides.

Interesting language with respect to releases is contained in two Circuit Court decisions where certiorari was denied prior to rendering an opinion in the *Garrett* case.

In *Bonici* v. *Standard Oil*, 103 Fed. 2d 437, 308 U. S. 560, certiorari denied, the Court said:

> "Hence, while 'one who claims that a seaman has signed away his rights to what in law is his due must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman,' (*Harman* v. *U. S.*, 5 Cir., 59 F. 2d 372, at p. 373), nevertheless *a release fairly entered into and fairly safeguarding the rights of the seaman, should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regu-*

> *larly into the courts of admiralty.* Even if a seaman is the court's ward, the court cannot be always at hand to watch over him, for it can only move ponderously in a formal law suit. *Fair settlements are in the interest of the man, as well as of the employers.* This conclusion is substantiated by the fact that Congress when it legislated as to one form of releases, namely those for wages, nevertheless did so on the basis that the release was good until set aside, for it provided that 'any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require' (Act of March 4, 1915, chap. 153, Sec. 4, 38 Stat., 1164, 1165, 46 U. S. C. A., Sec. 597; *Pacific Mail Steamship Co.* v. *Lucas,* 258 U. S. 266)." (Emphasis supplied.)

In the second case, *Sitchon* v. *American Export Lines,* 113 Fed. 2d 830, 1940 A. M. C. 1292; 311 U. S. 705, certiorari denied, the Court said:

> *"If such a settlement as the one in the case at bar is voidable, no release by a seaman could ever be free from attack, if he subsequently discovered that his injuries were greater than he anticipated when executing the release.*
>
> "When a seaman has made a settlement after full investigation and with independent advice, we can see no ground for holding it invalid. The question in any case is whether the seaman, if he is acting alone, has intelligence enough to fully understand the situation and the risk he takes in giving up the right to prosecute his claim, or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation." (Emphasis supplied.)

As a sidelight it should be mentioned here that while seamen are still "wards of admiralty", there has been a

great evolution since Justice Story defined that term in *Harden* v. *Gordon,* Fed. Case 6047 (CC Me 1823) and Jude Ware in The David Pratt, Fed. Case 3597 (DC Me 1839).

> "(Seamen) . . . are parties who do not stand in making their contracts, on even ground. Merchants are shrewd, careful . . . far-sighted in providing for their own interests; while seamen are ignorant, improvident and necessitous . . . wholly unable to defend their rights against the superior knowledge sagacity and wealth of their employers . . ."
>
> *The David Pratt, supra.*

They are still the wards of the Federal Courts but the days of Captain Bligh, shanghaiing and abandonment, are now ancient history. We are now in an era of great union activity wherein the seamen are very thoroughly indoctrinated with their rights, particularly those concerning illness, injury and wages.

Today, seamen are most cognizant of their position and aware of the effect of their joint action on such ponderous affairs as the National economy.

While seamen are still regarded as wards of the admiralty courts, and their interests are safeguarded in contractual matters, the courts have consistently held that their contractual obligations and responsibilities must be recognized when they have been fairly dealt with.

With the general rise in educational standards throughout the United States, the seaman today is on the average educated, literate, and fully capable of understanding and enforcing his rights.

The maritime unions keep their membership well oriented on their rights and employment conditions through booklets, pamphlets on the law applicable to seamen, and union newspapers. Some unions actually maintain an

educational division. The National Maritime Union employs counsellors to assist seamen in the handling of personal injury and wage claims. Today's seaman cannot be considered naive or credulous.

(a) Voluntarily executed:

The record of petitioner's testimony, his correspondence overwhelmingly indicate that Thompson took the initiative in the negotiations that culminated in the execution of the release.

In the Point San Pablo, 1940 A. M. C. 1004, 102 P 2d 412 (Dist. Ct. App. Cal. 1940) the injured seaman sent several letters to the shipowner in which he sought settlement. He instituted and entered into negotiations willingly. In sustaining the release, the Appellate Court said:

> "The record is totally bereft of any evidence that the appellant steamship company or its representatives did anything either to urge respondent to enter into negotiations for a settlement or to induce him to sign the release . . ."

Thompson's negotiations with respondent were most protracted as in the Point San Pablo, and also in *Harmon* v. *United States,* 59 Fed. 2d 373 (CCA 5th 1932) where the release was sustained. See also The Law of Seamen, Norris Vol. 1, Sec. 512 (1951).

(b) He Knew What He Was Doing:

Thompson's correspondence shows that he knew he had a fractured skull. His own doctor, Dr. Somberg, stated that the procedure at Marine Hospitals was to familiarize the men with their physical condition (R. 152a). Thompson had been going to sea for 40 years. He had used lawyers before, and he knew the nature and use of a release, for

he had claims before against steamship companies (R. 207a):

> "The Court: I'm going to assume, in the absence of further proof, that the man knew he was signing a release when he signed that paper."

Judge Knox of the Federal Court for the Southern District of New York had an interesting and applicable situation in *Little* v. *United States of America,* 1946 A. M. C. 611. Here, the seaman had a long and varied experience not only on sea but on land. He had had three falls down stairs on ships, three separate ships in a period of five years or thereabouts. After being hospitalized, he went on his own volition to the vessel's owners, and negotiated a release similar to releases that he had executed in the past. He was not represented by counsel, but negotiated with the claim agent or attorney for the company. In holding the release valid, the following colloquy was held between the libellant and Judge Knox:

> "The Libellant: When they settled with me there I didn't have any suspicion that I was going to have any trouble, to have my leg cut off or anything like that. I did not know that I was going to have a permanent trouble with my ears at the time, and I beg you——
>
> The Court: I quite agree that that may be entirely possible, but nevertheless you went there and you negotiated for a settlement, and it was made.
>
> The Libellant: I agree I signed it.
>
> The Court: And these documents, made by intelligent people, must have some recognition when they come into court. You may have made a bad bargain.
>
> The Libellant: Well, I did not know I would have to be put in this position.
>
> The Court: I am sorry, but that is the finding and judgment of the Court."

It is a most important consideration in this case that Thompson did admit that he previously executed releases.

> "The intelligence, literacy, amount of schooling and ability to understand the nature and character of his act in releasing his claim are generally carefully observed and weighed by the courts in determining the validity of a release given by a seaman. Where a seaman has sufficient intelligence to be capable of acting for himself; gives a release with full knowledge of what he is doing; has been apprised of all of his rights and has not been overreached—then such a release will be sustained. The fact that the seaman had previously acted for himself in negotiating and settling other claims with other shipowners, is often considered in determining that 'he knew what he was doing'."
>
> Norris, The Law of Seamen, Vol. I, Sec. 511.

(c) Available Legal and Medical Advice:

Thompson had repeated opportunities to retain counsel but expressed the desire to conduct negotiations himself. It would be absurd to think that the claim agent Barron had an obligation to send Thompson to a lawyer before talking to him.

> "The fact that libellant was without a lawyer to counsel him, alone is not enough to set aside this release in view of all the facts and circumstances disclosed."
>
> *Schlitzkus* v. *United States*, DC SD NY 1948, 1948 A.M.C. 688.

As for available medical advice; what could be more impartial than four different United States Marine Hospitals.

Dr. Farr was retained to assist claim agent Barron evaluate the case. Dr. Farr was more conservative than the United States Marine Hospital. The United States Marine Hospital at Stapleton, Staten Island, in their final discharge note, recommended only 30 days convalescence and stated that the prognosis was "good". Dr. Farr recommended 90 days convalescence and predicted that Thompson would have a 10% permanent disability. *At the trial below, there was absolutely no evidence offered that petitioner was permanently injured to any degree whatsoever.*

Thompson went back to work one month ahead of Dr. Farr's prediction and worked continuously for at least four years. There was intermittent treatment at United States Marine Hospitals for unrelated ailments. He passed a sign-on physical examination on thirteen vessels subsequent to the execution of the release and never made any complaint of disability on any of these vessels. There is no record of treatment for encephalopathy subsequent to executing the release.

Respondent was in no better position to evaluate this case than was Thompson.

An interesting comment by a lower court in a situation where the medical condition of a seaman changed for the worse after the signing of the release is *McGraw* v. *States Steamship Company*, 1954 A.M.C. 148:

> "The evidence at the trial established the fact that libellant took the initiative in suggesting a settlement. In the light of the known medical history at the time there was no overreaching on respondent's part. *Libellant McGraw, himself, obtained the abstract of the clinical record from the Marine Hospital* which showed that the libellant was then suffering from painless gross hermaturia—etiology

unknown. This record was further substantiated by the report from the Bluff Hospital, Yokohama, Japan, which was known to both parties.

"On February 21, 1952, based on the Marine Hospital report and that of the Bluff Hospital, libellant was paid maintenance to and including February 28, 1952, together with his unearned wages and transportation.

"Dr. Berger of the Marine Hospital confirmed the clinical reports, through a telephonic communication to the office of the claim agents, at which time libellant was present. *Respondent was in no better position to determine the clinical or medical facts than was libellant* and the future of the course of the case from a medical viewpoint was problematical and in the realm of speculation. The apparent kidney ailment might have corrected itself in a matter of weeks.

"Based on the information in possession of both parties, the settlement was a fair one and the consideration was adequate. Subsequent developments showing the need for extended medical treatment and care, were not anticipated by either party and do not control in determining the validity of the release. Any financial pressure which libellant was under at the time of settlement was not known to respondent's representative."

(d) Adequate Consideration:

A claim agent is certainly not to be held to be a prophet in addition to a medical expert and quasi-legal expert, nor is a merchant seaman. And yet, business must be transacted from day to day upon a recognition of things as they are. To disturb a contract as freely entered into as the one here presented would be to flood the courts with an ever increasing wave of cases, and do away once and for all with the very function of adjustment.

At the time the release was entered into, the claim agent considered that Thompson had a case of questionable liability. He also recognized the fact that only 30 days maintenance ($180.00) was due to the petitioner according to the Marine Hospital's discharge records and only 3 months maintenance according to the respondent's own Dr. Farr. He also recognized that the petitioner's lost wages for the 6 months disability only came to $1,500.00 (6 months at $240.00 a month). He also recognized that the medical condition of the petitioner could not be wholly accounted for by virtue of the accident, but was obviously and irrevocably tied up with petitioner's prior syphilitic condition, his duodenal ulcers, and other physical problems. If the claim agent sought to overreach this petitioner, (if such were possible, of which we are extremely doubtful), he would certainly not have offered the substantial sum of $4,000.00 in such a situation. The claim agent also recognized that a failure to compromise would result in a protracted lawsuit which would entail a substantial exposure to his employer. The generosity of the settlement was undoubtedly influenced by this fact.

It is respectfully submitted that the Circuit Court properly distinguished Thompson's circumstances from those involved in *German* v. *Carnegie-Illinois Steel Corp.*, 169 Fed. 2d 715 (1948) where the amount of consideration given for the release did not even equal the amount of accrued maintenance.

The amount of settlement that Thompson received was not such as could be said to "shock the conscience of the Court".

Ames v. *American Export Lines*, 41 F. Supp. 931 (DC SD NY 1941);

Stuart v. *Alcoa Steamship Co.*, 143 F. 2d 178 (CCA 2d 1944);
Schlitzkus v. *United States*, 1948 A. M. C. 688 (DC NY 1948).

(e) The Case at Best Was One of Questionable Liability:

Involved here is the principal question which we presume this Court considered of sufficient import to grant certiorari.

The District Court and the dissenting opinion in the Circuit Court thought claim agent Barron made a material though innocent misrepresentation of law when he told Thompson he had a weak case.

Barron was a claims adjustor whose position was to settle and adjust seamen's injury and wage claims. The settlement of these claims prior to suit served the necessary and advantageous function of avoiding time-consuming and expensive litigation.

He was not an attorney but his duties made him familiar to some degree, with the existing law applicable to seamen's claims.

Whether Barron was right or wrong, he did inform Thompson that he had the alternative of rejecting the offer and suing, that he might substantiate liability and get more than four thousand dollars. Thompson told Barrron that he had been to lawyers who assured him they could get more than the fifteen thousand he originally demanded (R. 261a and 262a).

As of June 2, 1950, the date of the release, the Courts had not yet spoken in *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2 Cir., 1952) and *Boudoin* v. *Lykes Brothers*, 348 U. S. 336.

The applicable law as commonly understood at the time this release was excuted can best be summarized by quoting

a paragraph from The Law of Seamen, Norris, Vol. 2, Sec. 687 (1952):

> "Men engaged in the operation of a vessel on the high seas work under conditions of close confinement which tend to breed irritations and sharp tempers such as are not usually encountered in employment ashore. Unless the ship is a "happy" one, these differences in temperament often erupt into quarrels with the disagreements being settled by resorting to fisticuffs. When the assault is purely a private affair between fellow crewmen, no responsibility for the ensuing injury is placed upon the shipowner. But if one of the assailants is a person of *known vicious character* or one whom the master or officers should have known was of vicious character, then the injury inflicted by him is another matter." (Emphasis supplied.)

And in the 1954 Supplement to Vol. 2 of The Law of Seamen, Norris, page 37:

> "It has long been the rule that the vessel can be held liable for an assault upon a seaman when the assailing member of the crew *had been known, or should have been known by the ship's officers,* to be a person of violent or vicious disposition. *Keen* v. *Overseas Tankship Corporation* has dispensed with the necessity of knowledge of such propensities, at least where an insane or psychopathic individual is concerned and in effect has made lack of knowledge as indefensible to the shipowner as the starting of the ship's plates at the commencement of the voyage."

The emphasis in 1950 was on knowledge of the assailant's vicious nature, a factor completely absent with respect to Medina, except that he was effeminate.

At the time, Barron and Thompson evaluated this case in their 1950 conferences, they did not have the benefit of

knowing just what evidence would be offered or what facts would be established in the 1954 trial. For instance, Thompson could not know whether witness Schopf would voluntarily testify that the claimed homosexual incident never took place (R. 12a), nor whether the District Court would believe Thompson or Schopf.

It was doubtful in 1950 that the facts would constitute liability under the theory that this was an assault by a superior on an inferior in furtherance of the employer's business.

> *Alpha Steamship Corp.* v. *Cain* (1930), 281 U. S. 642;
> *Jamison* v. *Encarnacion* (1930), 281 U. S. 635;
> *Brailas* v. *Shepard Steamship Co.*, 152 F. 2d 849 (CCA 2d 1945);
> *Lykes Bros. Steamship Co.* v. *Grubough*, 128 F. 2d 387 (CCA 5th) 1942 M.O.D. 130 F. 2d 25.

In 1950, it could have been considered that this was a private brawl arising out of a personal grudge between assailant and victim, with no resulting liability on the part of the employer. See *Kable* v. *United States*, 169 F. 2d 90 (CCA 2d 1948); also see *Brailas* v. *Shepard* (*supra*), and *Lykes Bros.* v. *Grubough* (*supra*).

The requirement that the assailant be a person of known vicious character was well publicized in 1950 by the decisions in *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (CCA 2d 1945); *Koehler* v. *Presque Isle Transportation*, 141 F. 2d 490 (CCA 2d 1944).

In Kyriakos, Judge Augustus N. Hand said:

> "Seamen have no legal power to rid themselves of dangerous shipmates. That power rests with the officers of the vessel. If the officers choose to continue to employ a man who is *known* or *should be*

> *known by them* to be a source of peril to those who sail with him, when measures which might reasonably be expected to prevent resulting injury are not or cannot be taken, a resulting injury to a member of the crew is one for which the person injured may recover under the Jones Act."

Even in *The Rolph,* 299 F. 52 (CCA 9th 1924), the case relied upon in the *Keen* decision, the assailant "was a man *known to be* (emphasis supplied) of a most brutal and inhuman nature, one known to give vent to a wicked disposition to assault sailors".

Indeed did not Judge Learned Hand admit that his approach was novel in deciding *Keen* v. *Overseas* when he said:

> "It is certainly possible to read that decision (*The Rolph*) as the Judge did in the case at bar; so as to limit the liability as to situations where the owner *knows* that the seaman is unfit."

Even in the *Keen* opinion, Judge Hand quoted two earlier cases which used language counter to that which he had held:

> *The E. B. Ward Jr.* (1883) 20 F. Rep. 702;
> *Hurley* v. *The Lizzie Frank* (1887) 31 F. Rep. 477.

Actually the *Keen* case pioneered the theory that a vessel is unseaworthy if it has aboard a seaman of vicious propensities, who does not add up to the ordinary measure of a seaman's calling, whether those propensities are known or unknown. It did not undertake to define just what it meant by a seaman of vicious propensities. It sent the case back to the District Court for a new trial, and it was settled. Actually, however, Judge Hand stated in his opinion, that all thoughout the case it was Keen's effort

to show that the assailant, Mruczinski, had been a drunken, dirty, quarrelsome seaman who was inherently dangerous and habitually had possession of deadly weapons. The plaintiff actually tried to prove that the assailant was insane.

The writer submits that it is most questionable whether a man such as Medina fits the definition of the individual involved in *Boudoin* v. *Lykes Brothers,* 348 U. S. 336 (1955). In Boudoin, the District Court thought that the assailant Gonzales, was "a person of dangerous propensities and proclivities"; "A person of violent character, belligerent disposition, excessive drinking habits, disposed to fights and making threats and assaults". The Court then went on to indicate that the definition it had in mind pertained to "A seaman with a wicked disposition, a propensity to evil conduct, a savage and violent nature".

This was not Medina. *True, he was effeminate, but was he actually a homosexualist?* Thompson's story of witnessing the homosexual act was not only uncorroborated, but denied by the alleged participant, Schopf. *However, presuming for the moment, that he was a homosexualist, will this Court go so far as to hold that a homosexual is per se a man of vicious propensities, a homicidal maniac, and that a ship which employs a homosexualist unseaworthy.*

Medina was employed aboard the SS. *Rosina Marron* for 6 months before Thompson ever came aboard. He was a good worker. He was popular. He played cards frequently with the crew and went ashore on leave with the crew. There was no record of his having any disagreements, quarrels, or arguments with anyone. His record with the United States Coast Guard was barren of any evidence indicating violence. He was in good standing with his union or he would not have been aboard the ship.

The deposition of Marvin Caplis appears in the record beginning on R. 17a. Caplis was the union delegate. He lived in the same room with Medina for about 8 months without incident. *He never saw Medina involved in nor was he approached by Medina with respect to homosexuality.* There was absolutely no evidence that Medina was prone to fights, drinking, or the carrying of dangerous weapons.

It is respectfully submitted that prior notice or indication to some person of a propensity or disposition on the part of Medina towards violence is a primary requisite in holding that Medina was a man of vicious propensities. That there was no prior notice or indication is concluded by the trial judge in his opinion ". . . Thus, his homicidal tendency had not appeared" (R. 23a). The trial judge concluded Medina to be a man of vicious propensities because of *the one and only assault on Thompson.*

The trial judge also admitted that mere effeminateness did not make a man violent;

> "Unless something serious cut across or invaded that area, he was not violent though effeminate."

Something more was necessary. That something, the trial court concluded, was the charge or accusation of homosexual acts which made him a "homicidal paranoiac":

> "But the charge against him of homosexual acts, whether true or false, did invade, and seriously, this very area of his delusion or aberration. This serious invasion of his delusional area made him the equivalent of a 'homicidal paranoiac', which the Keen case finds to be inherently dangerous to the ship."

Thus the court adjudicated, not only the fact of, but the type of Medina's alleged insanity without any psychiatric

examination and without Medina even being in court. The number of convictions for murder, in spite of pleas of insanity, would indicate that a murderer is not a "homicidal paranoiac" *per se.*

The word "propensity" is defined by Webster's Dictionary as "a natural inclination or bent; a favorable disposition, a like or bias." How can a bent, inclination, or disposition, vicious or otherwise, be determined without an objective appraisal of the subject's behavior patterns? If those behavior patterns were observed, and his experiences were void of past evidence of tendencies towards viciousness or violence, how can we say that the subject's personality has a vicious tendency, inclination or *propensity?*

One further word on homosexuality. If we put aside the natural abhorrence towards this disorder and examine it from an enlightened point of view, we would appreciate the fact that these individuals are not culpable. That homosexuality is due to a glandular imbalance is now common knowledge. Such individuals should not be denied the right of gainful employment because of an organic deficiency. *It can be argued that a homosexual has as equal a right to gainful employment as a diabetic.*

(f) In Any Event the *Boudoin* Case Cannot Have Retroactive Effect on a Contract Valid at the Time It Was Executed:

There is a general theory of law which is of assistance in demonstrating that the *Keen* or *Boudoin* cases cannot have any retroactive effect upon a contract which was valid at the time it was executed. If a person feels aggrieved by a judgment or final order in a case under the Federal Rules of Civil Procedure, either because of mistake, fraud, inadvertence, etc., he resorts to Rule 60(b) of the Federal Rules

which allows the court to set aside or modify such a judgment or order. It is abundantly established, however, that Rule 60 cannot be resorted to merely because of the fact that a subsequent decision has changed the law in respect of which the particular claimant's case had been decided. See:

Safeway Stores v. *Coe,* 136 F. 2d 771 (C. A. D. C.);

Lahman v. *Appleton Toy & Furniture Co.,* 148 F. 2d 998 (C. A. 7th);

Creedon v. *Smith,* 8 F. R. D., 162 (N. D. Ohio);

Phelan v. *Bradbury Building Corp.,* 7 F. R. D., 429 (S. D. N. Y., Goddard, J.) (and cases there cited);

Sunbeam Corp. v. *Charles Appliance,* S. D. 1953, 1199 F. Supp. 492.

Sympathy flows towards a person such as Thompson who has had such a harrowing experience, but let us reassure this Court that the circumstances surrounding the execution of the release have been thoroughly reviewed by the Circuit Court. The original three judges who heard the oral argument unanimously found the release valid. After re-argument before all seven judges, the release was again found valid with two judges who did not hear the oral argument filing a dissenting opinion.

WHEREFORE, it is respectfully submitted that the ruling of the Circuit Court for the Third Circuit be affirmed.

MICHAEL E. HANRAHAN,
Proctor for Respondent.

FILED
JAN 20 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1955

No. 105

WILLIAM THOMPSON,

Petitioner,

against

COASTAL OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SILAS BLAKE AXTELL,
CHARLES ANDREWS ELLIS,
Counsel for Petitioner.

Of Counsel:
ELMER C. MILLER,
JOHN A. GLEASON,
MARTIN G. STEIN.

ACKERMAN PRESS, Phones BO 9-7107-8

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REPLY BRIEF FOR THE PETITIONER

Statement

Three features of Respondent's Brief so rebound against Respondent as to occasion this reply. They are: (1) Respondent's reliance on the terms of the release; (2) the "generosity", "adequacy" and "Ex post facto" arguments, and (3) the fallacious syllogism of Respondent's whole argument.

At trial Respondent's counsel stated: "First of all, from the defense point of view the most important thing here is the release" (R. 249a). In its Brief in Opposition (to the Petition for the writ here) Respondent stated: "The sole question involved is the validity of the seaman's release" (p. 1), and that the Court of Appeals "took the facts as determined by the District Court", but "held the release valid as a matter of law" (p. 2).

But whereas a seaman's release can be held *invalid* as matter of law, it cannot be held *valid* as matter of law, because of defendant's burden of proof under the *Garrett* case rule.

I

Because of its terms the release is void on its face.

Respondent now cites the full text and quotes clause "(4)" of the release in its Brief (p. 7).

The terms of the release (Ex. D-5 at R. 347a marked at R. 228a), however, make it void *on its face,* because of its recitals of:

1. Release by the seaman of "*rights* and claims . . . *not known* to me" and "even though I *do not know*" thereof. (Italics ours.)

2. Release by the seaman of "*every right or claim* which I now have or *may hereafter have* because of *any* matter or thing which happened before the signing of this paper"; and the commanded answer "Release of *everything*" at question "E". (Italics ours.)

3. Release of rights by the seaman "*without regard to anything that has been told me by anybody,*" "*Regardless* of what *anyone* may have told me", and "*all* this *regardless of what anyone* may have told me about my injuries, illnesses and *disabilities* or about *anything else.*" (Italics ours.)

4. That the seaman means "*everything* that is said on this paper" and that he signs the release "*because I am getting the money*"—an *unapportioned* recited sum of $4,000. (Italics ours.)

These provisions are completely, literally and in their tendency and effect incompatible with the "full understanding of his rights" required under *Garrett* v. *Moore-*

McCormack Co., 317 U. S. 239, 248, and the consequent duty of the releasee to explain and make these clear to the seaman.

To evidence compliance with the requirements of *Garrett* v. *Moore-McCormack Co., supra,* any such recitation (if made) must be of rights and claims *now* known to and fully understood by the seaman; with the release *limited* and *confined* to such only of the seaman's *present* rights and claims as he had been made to fully understand; and that the release was with due regard to the relations of the parties and to Respondent's duty to explain to the seaman his disability and rights, and WITH due regard (instead of "without regard") to respondent's representations and alleged belief and the seaman's consequent understanding thereof.

The release of rights "*not known* to me" is in contemptuous disregard of the requirement that rights released must be fully understood by the seaman.

The release of rights "*without regard* to" and "*Regardless* of" "*anything*" or "what *anyone*" may have told the seaman is both in contemptuous disregard of the required "full understanding" by the seaman of his rights, and a designed effort to license misrepresentation, deceit and fraud.

Of similar clauses designed to negative and prevent the showing of representations amounting to fraud, it has been said that:

> "It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there were in his own mind at least a lingering doubt as to the honesty and integrity of his conduct".
>
> *Bridger* v. *Goldsmith,* 143 N. Y. 424, 428 (1894); *Strand* v. *Griffith,* 8 Cir. 97 Fed. 854, 858 (1899).

See also:

S. Pearson & Son, Ltd. v. *Lord Mayor of Dublin,* (1907) A. C. 351, 364-365.

And these cases further held that:

> "*Public policy* and morality are both ignored if such an agreement can be given effect in a court of justice . . . *Such a principle would in a short time break down every barrier* which the law has erected against fraudulent dealing." (Italics ours.)

Bridger v. *Goldsmith, supra,* 143 N. Y. 424, 428; *Strand* v. *Griffith, supra,* 8 Cir. 97 Fed. 854, 858-859.

As said in *Pearson and Son, Ltd.* v. *Lord Mayor of Dublin* (1907), A. C. 351, 360, 365:

> "Such a clause might in some cases be part of a fraud, and might disguise a fraud" (p. 360).

And "is a contract to submit to a fraud" (p. 365).

These principles are equally applicable to the law and *public policy* involved here.

In *Garrett* v. *Moore-McCormack Co., supra,* 317 U. S. 239 (1942), this Court stresses "Our *historic national policy,* both legislative and judicial" (317 U. S. 246), and "In keeping with this *policy*" (317 U. S. 247).

Garrett v. *Moore-McCormack Co.,* thus represents not only law but *public policy*—traditional, historic, repeated, persistent *national policy,* protective not only of the seaman but of the national welfare. The War of 1812 shortly before Mr. Justice Story's decision in *Harden* v. *Gordon,* 2 Mason 541, Fed. Case No. 6047 (1823), and the two world wars before this Court's 1942 decision in *Garrett* v. *Moore-McCormack Co., supra,* had shown the vital na-

tional necessity for a merchant marine manned, in peacetime and war, by seamen who could be confident that their meagre rights would be protected.

Approval by this Court of the form of seaman's release involved here "would in a short time break down" this public policy.

There is applicable also the principle unanimously stated by this Court respecting contracts affected by public policy, in the opinion by Holmes, J., in *Hazelton* v. *Sheckells,* 202 U. S. 71, 79 (1906), that:

> "The objection to them rests in their *tendency,* not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding it was cut down to what was done and was harmless. The Court will not inquire as to what was done" (202 U. S. 79). (Italics ours.)

The Court cited *McMullen* v. *Hoffman,* 174 U. S. 639, 647, and *Weil* v. *Neary,* 278 U. S. 160, 173-174, in the latter of which this Court stated:

> "What is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their *tendency* to evil in other cases" (278 U. S. 173). (Italics ours.)

Clearly the "*tendency*" the obvious design and purpose, and equally the "actual evil results" of a form of release such as this one, is to contract away and circumvent both the law and public policy of *Garrett* v. *Moore-McCormack Co., supra.*

Respondent's counsel states that 90% of seaman's cases are settled (R. 293a). If therefore, this form of release be approved, the 90% of injured seamen settling cases from day to day will be obliged to sign and be bound

by releases of "rights and claims . . . *not known to me*" and this "*without regard* to" and "*Regardless* of" "*what*" or "*anything*" that may be told him "by *anybody*" or "*anyone*" in procuring the release—this in direct violation of the law and public policy of *Garrett* v. *Moore-McCormack Co., supra.*

Three principal Maritime Circuits, the First, Second and Ninth Circuits, have held that *all* the various rights which a seaman's release is designed and purports to give up must be fully explained to and fully understood by him and that if the release recites or is broad enough to cover any rights not fully explained to and fully understood by the seaman, the release is void.

Bay State Dredging & Contracting Co. v. *Porter,* 1st Cir., 153 F. 2d 827, 829, 831, 832, 833-834 (1946);
United States v. *Johnson,* 9th Cir., 160 F. 2d, 789, 794, 795, 796 (1947);
Muruaga v. *United States,* 2nd Cir., 172 F. 2d. 318, 320-321 (1949);
Mavromatis v. *United Greek Shipowners Corp.,* 1st Cir., 179 F. 2d. 310-317 (1949);
Waters v. *United States,* 9th Cir., 191 F. 2d, 212, 214, 215, 216-217 (1951).

In *Bay State Dredging & Contracting Co.* v. *Porter, supra,* the First Circuit approved the District Court's refusal to admit the release in evidence holding it void *as matter of law.*

In *Waters* v. *United States, supra,* the Ninth Circuit, reversing the District Court and holding a seaman's release invalid for failure of defendant to meet the burden of proving its validity, said:

> "It is clear that appellant understood he was releasing *all rights* but it is *not* clear that he understood *what* those rights were" (191 F. 2d 216). (Italics ours.)

Even the Third Circuit in *W. J. McCahan Sugar Refining & Molasses Co.* v. *Stoffel*, 41 F. 2d, 651, 653-654 (1930), held a seaman's release void on its face (*i.e.*, "Looking into the agreement," "whereby the appellant agreed" p. 653), "*because against public policy*" (p. 653), which, of four recited reasons, it considered "the one of capital importance" (pp. 653-654), saying:

> "If this contract were otherwise good it would still be bad *because opposed to public policy*" (p. 654). (Italics ours.)

Here, the release is no more a release of rights arising from a designated incident or from known or prognosed disabilities than of "rights . . . *not known*" to the seaman.

And as this Court unanimously held in *Hazelton* v. *Sheckells, supra*, 202 U. S. 71, 78 (1906), in an opinion by Holmes, J.:

> "Every part of the consideration goes equally to the *whole promise* and therefore, *if any part of it is contrary to public policy, the whole promise falls*" (202 U. S. 78). (Italics ours.)

Since both the law and public policy rule of *Garrett* v. *Moore-McCormack Co., supra*, is that the seaman must have "full understanding of his rights", and since not a dime or dollar of the consideration recited in this release can be separately ascribed to known rights, as distinct from "rights and claims . . . *not known to me*", or can be treated as paid *with* regard, as distinct from "*without* regard", to representations made to the Seaman, the whole release falls and is void *on its face* as matter of law.

II

The "generosity", "adequacy" and "ex-post facto" arguments of Respondent and of the majority below all serve to emphasize that respondent failed to explain to the seaman or allow any settlement value for Jones Act and unseaworthiness rights, and paid on the basis also of mistaken prognosis.

Nowhere in its brief does Respondent contend that a possible right to recover under the Jones Act or for unseaworthiness was explained to the seaman; nor was any part of the $4,000 paid in recognition and compromise thereof.

On the contrary, its "generosity", "adequacy" and "ex-post facto" arguments are based on its asserted belief (and representation) that no such rights existed. This argument, therefore, shows that such rights *were not even compromised.*

The attempt to justify the settlement as one of a "questionable liability" (Respondent's Brief, pp. 25-30) overlooks the fact that the pro and con aspects of any "doubts" compromised, were not as respects either Jones Act or unseaworthiness liability. Respondent's Brief now argues (p. 27) that "*It was doubtful* in 1950 that the facts would constitute" Jones Act liability, and, as respects unseaworthiness "In 1950, it *could have been considered* that this was a private brawl".

But this was not the explanation given to the seaman nor the subject matter compromised or paid for. The defendant represented and the amount allowed in settlement was based on the belief, that no such liability existed and nothing was in fact paid on any theory that such a liability might exist.

Hence, the now acknowledged compromisable "doubts" respecting this were "*not presented to the mind of the*

party interested." (*Harvey* v. *Cooke,* 4 Russ. Ch. 54 (1827)). To the same effect *Lawton* v. *Campion,* 18 Beavan's R. 87 (1854); *Cooper* v. *Phibbs,* L. R. 2 H. L. 149, 170 (1867). *Harvey* and *Lawton* held compromise releases invalid.

Harvey v. *Cooke* points out mistaken representation and failure to understand rights, and the *consequent* "most liberal provision" with which "*with that impression on her mind she could not fail to be well-satisfied*" (4 Russ. Ch. 56, 57).

In *Lawton* v. *Campion,* because a Court decision rendered "in another suit" between other parties two years after the compromise had been executed showed a mistaken legal basis for the settlement, the settlement was held not binding. The argument overruled is closely analogous to Respondent's argument respecting "*ex post facto*" effect of the *Keen* and *Boudoin* decisions.

The above cited decisions of three principal maritime Circuits have held that although a shipowner believes there was no Jones Act or unseaworthiness liability, it was the shipowner's duty, nevertheless, to explain fully to the seaman his possibility of having such rights, and to make the compromise with reference thereto, and that a release obtained without this is invalid.

Bay State Dredging & Contracting Co. v. *Porter, supra,* 1st Cir., 153 F. 2d 827, 829, 831, 832, 833-834 (1946);

U. S. v. *Johnson, supra,* 9th Cir., 160 F. 2d 789, 794, 795, 796 (1947);

Muruaga v. *U. S., supra,* 2nd Cir., 172 F. 2d 318, 320-321 (1949);

Mavromatis v. *United Greek Shipowners Corp., supra,* 1st Cir., 179 F. 2d 310-317 (1949);

Waters v. *United States, supra,* 9th Cir., 191 F. 2d, 212, 214, 215, 216-217 (1951).

In *Bay State Dredging & Contracting Co.* v. *Porter,* the Court stated that cross-examination showed that:

> "the agent had only the foggiest notion of what plaintiff's rights were; and even if he had attempted to do so, he could not have explained plaintiff's rights with any approach to accuracy" (153 F. 2d 831).

This is true of agent Barron here as respects either Jones Act or unseaworthiness rights. But in addition Barron here affirmatively represented that the petitioner had no such rights.

Moreover, whether or not Dr. Farr himself stated his mistaken prognosis to petitioner, Barron admittedly did. And Mahoney told him no more would be paid "because you are well" (R. 106a, 107a).

These very points of mistake in both law and prognosis are the only possible justification for Respondent's present arguments of "generosity", "adequacy" and "ex post facto"; and the arguments do not refute but themselves further confirm the mistaken basis for the release.

III

The argument that respondent "sustained its burden", even if true, could not justify a reversal of findings not clearly erroneous. Neither respondent nor the majority below have urged nor can they show that the findings are clearly erroneous.

Respondent's whole argument consists of a contention that Respondent "sustained its burden under the *Garrett* rule" (Respondent's Brief, pp. 14, 15, *et seq.*). Even less affirmatively the majority opinion below reversing plaintiff's judgment states:

> "We cannot say that defendant has *failed* to show an absence of coercion" (221 F. 2d 561; Petition, p. 10a).

Respondent argues that "to upset" the release (Respondent's Brief, p. 14) "to *set aside* the release" (Id., p. 15) "to *disturb* a contract" (Id., p. 23) "which was *valid* at the time it was executed" (Id., p. 31) involves the same principle as "to *set aside* or modify . . . a judgment or order" (Id., pp. 31, 32). In similar vein the very holding of the majority below was that, "We are of the opinion that the District Court committed error in *striking down* this release" (221 F. 2d 560; Petition, p. 9a). Compare the dissenting judges' statement that "We think the release executed by Thompson *was invalid*" (221 F. 2. 562; Petition, p. 1a) and the District Court's holding that "The release accordingly is *no bar*" (110 F. Supp. 845; Petition, p. 24a).

State Respondent's argument in whatever form of syllogism, its major premise, minor premise, and conclusion are erroneous. It is premised on the theory that the release has a *prima facie* validity, contrary to the burden of proof rule of *Garrett* v. *Moore-McCormack Co., supra.* And it is further premised on the theory that if a party sustains its burden of proof, this eliminates instead of presenting an issue of fact, contrary to the issue of fact rule of *Callen* v. *Pennsylvania R. R. Co.*, 332 U. S. 6 (1948).

In *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U. S. 386, 407, 408-409 (1934), this Court held that where as here a jury is waived the Court exercises "the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict" (291 U. S. 407), and that:

> "Saying that the plaintiff *has sustained the burden of proof* . . . is not an adequate *finding* of the matters of fact involved . . . *it does not adequately respond to the issue.*" (291 U. S. 408, 409) (Italics ours.)

Under *Garrett* v. *Moore-McCormack, supra,* it is not for the seaman to "upset", "set aside" or "disturb" a release; the burden is on defendant to prove its validity.

Unless defendant "sustains" its burden, the release must be held invalid as matter of law; if defendant "sustains" its burden, a question of fact arises.

In *Bay State Dredging and Contracting Co.* v. *Porter, supra,* 1st Cir., 153 F. 2d, 827, 833-834, where (as here) the defendant's agents "Admittedly . . . made no such disclosure" to a seaman of his possible Jones Act and unseaworthiness rights, the Court said:

> "Defendant utterly *failed to lay the necessary factual foundation* upon which the validity of the release could have been submitted, with appropriate instructions to the determination of the jury" (153 F. 2d 833-834). (Italics ours.)

It therefore affirmed the District Court's refusal to admit the release in evidence.

In *Waters* v. *United States, supra,* 9th Cir., 191 F. 2d, 212, 217, reversing a judgment for defendant which had sustained a seaman's release, the Court said:

> "However, on the record before us we are of the view that appellee *failed to meet the burden imposed upon it by law and the release must be held invalid*" 191 F. 2d 217). (Italics ours.)

In *Muruaga* v. *United States, supra,* 2d Cir. 172 F. 2d, 318, 320, reversing a judgment for defendant which had sustained a seaman's release, the Court said:

> "The appellant understood when he signed the release that he was ready for work and hoped to be re-employed. The finding that he executed the release with adequate knowledge of his condition and

his legal rights must be set aside as *clearly erroneous.*" (172 F. 2d 320). (Italics ours.)

Assuming, therefore (although it clearly was not so) that defendant "sustained its burden" or has not "failed" to sustain its burden, this could not justify the reversal of the District Court's judgment; for there still remained the District Court's findings of fact, which were not clearly erroneous. In *Callen* v. *Pennsylvania R. R. Co., supra,* the burden of proof was the other way. But the *Callen* decision clearly establishes that where the party having the burden met that burden, it was error to rule in his favor as matter of law, rather than treating the question then as an issue of fact.

Respondent's very syllogism thus is erroneous; its whole argument offers no basis whatever for sustaining the reversal of the District Court judgment by the Court of Appeals.

Respectfully submitted,

SILAS BLAKE AXTELL,
CHARLES ANDREWS ELLIS,
Counsel for Petitioner.

Of Counsel:

ELMER C. MILLER,
JOHN A. GLEASON,
MARTIN G. STEIN.